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Federal Rule of Criminal Procedure 6(e)[1] governs the disclosure of federal grand jury materials. Codifying the common law presumption of secrecy,[2] the rule prohibits disclosure, with certain limited exceptions.[3] One exception allows disclosure "when so directed

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1. Rule 6. The Grand Jury

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(e) Recording and Disclosure of Proceedings.

(1) Recording of Proceedings. All proceedings, except when the grand jury is deliberating or voting, shall be recorded stenographically or by an electronic recording device. An unintentional failure of any recording to reproduce all or any portion of a proceeding shall not affect the validity of the prosecution. The recording or reporter's notes or any transcript prepared therefrom shall remain in the custody or control of the attorney for the government unless otherwise ordered by the court in a particular case.

(2) General Rule of Secrecy. A grand juror, an interpreter, a stenographer, an operator of a recording device, a typist who transcribes recorded testimony, an attorney for the government, or any person to whom disclosure is made under paragraph (3)(A)(ii) of this subdivision shall not disclose matters occuring before the grand jury, except as otherwise provided for in these rules. No obligation of secrecy may be imposed on any person except in accordance with this rule. A knowing violation of Rule 6 may be punished as a contempt of court.

(3) Exceptions.

(A) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury, other than its deliberations and the vote of any grand juror, may be made to —

(i) an attorney for the government for use in the performance of such attorney's duty; and

(ii) such government personnel as are deemed necessary by an attorney for the government to assist an attorney for the government in the performance of such attorney's duty to enforce federal criminal law.

(B) Any person to whom matters are disclosed under subparagraph (A)(ii) of this paragraph shall not utilize that grand jury material for any purpose other than assisting the attorney for the government in the performance of such attorney's duty to enforce federal criminal law. An attorney for the government shall promptly provide the district court, before which was impaneled the grand jury whose material has been so disclosed, with the names of the persons to whom such disclosure has been made.

(C) Disclosure otherwise prohibited by this rule of matters occurring before the grand jury may also be made —

(i) when so directed by a court preliminarily to or in connection with a judicial proceeding; or

(ii) when permitted by a court at the request of the defendant, upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury.

If the court orders disclosure of matters occurring before the grand jury, the disclosure shall be made in such manner, at such time, and under such conditions as the court may direct.

(4) Sealed Indictments. The federal magistrate to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. Thereupon the clerk shall seal the indictment and no person shall disclose the return of the indictment except when necessary for the issuance and execution of a warrant or summons.

Amendments to Rule 6 are under consideration, but have not yet received the approval of the Standing Committee, and do not include any proposed revisions of the 6(e)(3)(C)(i) exception. *See* 30 CRIM. L. REV. (BNA) 3001-06 (Oct. 21, 1982).

2. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 218 n.9 (1979); United States v. Tager, 638 F.2d 167, 168 (10th Cir. 1980).

3. The rule is bifurcated, authorizing disclosure without a court order in some circumstances, and requiring a court order in others. Disclosure without a court order can be made

by a court preliminarily to or in connection with a judicial proceeding."[4] Federal administrative agencies rely on this exception when they seek grand jury transcripts[5] for use in civil law-enforcement in-

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under Rule 6(e)(3)(A)(i) to an "attorney for the government," and under 6(e)(3)(A)(ii) to government personnel assisting the attorney in criminal law enforcement activities. The phrase "attorney for the government" is a term of art defined by rule 54(c) to include the Attorney General, an authorized assistant of the Attorney General, a U.S. Attorney or an authorized assistant of a U.S. Attorney. FED. R. CRIM. P. 54(c). The U.S. Attorney may also designate other federal government attorneys as "Special Assistant U.S. Attorneys" under the broad authority of 28 U.S.C. § 515(a) (1976). Disclosure pursuant to court order is allowed if the request is made "preliminarily to or in connection with a judicial proceeding" under 6(e)(3)(C)(i), or if the defendant makes a showing that grounds exist to dismiss the indictment, under 6(e)(3)(C)(ii). Rule 6(e)(2) makes improper disclosure punishable as a contempt of court.

Although this Note is concerned only with the interpretative difficulties surrounding federal agency disclosure petitions under rule 6(e)(3)(C)(i), it is worth noting that rule 6(e)(3)(A) has generated confusion as well. It is well settled that U.S. Attorneys may disclose grand jury materials under 6(e)(3)(A)(ii) to federal agency personnel in order to assist in *criminal* law enforcement, provided that agency personnel do not later put this information to civil uses. *See, e.g.*, United States v. Birdman, 602 F.2d 547, 563 (3d Cir. 1979); *In re* Perlin, 589 F.2d 260, 267 (7th Cir. 1978); United States v. Gold, 470 F. Supp. 1336, 1350 (N.D. Ill. 1979); United States v. Dondich, 460 F. Supp. 849, 856 (N.D. Cal. 1978); *In re* Grand Jury Proceedings, 445 F. Supp. 349, 350 (D.R.I. 1978). *See generally* Comment, *Administrative Agency Lawyers' Presence in the Grand Jury Room: Rules to Prevent Abuse*, 128 U. PA. L. REV. 159 (1979). It is not clear, however, whether grand jury material may be disclosed without a court order to Department of Justice Civil Division attorneys under 6(e)(3)(A)(i). The Fifth Circuit has concluded that since 6(e)(3)(A)(i)'s language does not expressly preclude disclosure for civil purposes, unlike 6(e)(3)(A)(ii)'s language, disclosure is authorized. *In re* Grand Jury, 583 F.2d 128 (5th Cir. 1978) (per curiam); *accord, In re* Grand Jury Proceedings, 505 F. Supp. 979 (D. Me. 1981). The Ninth Circuit has reached the opposite conclusion, and held that automatic disclosure to Civil Division attorneys is not contemplated by 6(e)(3)(A)(i). Sells, Inc. v. United States, 642 F.2d 1184, 1190 (9th Cir. 1981), *cert. granted*, 50 U.S.L.W. 3875 (May 4, 1982) (No. 81-1032); *accord, In re* Grand Jury, September 20, 21, 22 and 25, 1967, 82 F.R.D. 70, 73 (N.D.W. Va. 1979).

4. *See* note 1 *supra*.

5. This Note will focus on requests for disclosure of transcripts, which are the most sensitive grand jury records. The Note will not consider the separate problems posed by requests for documents. Most courts consider a petition for documents to fall within rule 6(e)'s scope, though that conclusion is not uniformly shared. *Compare* United States v. Gold, 470 F. Supp. 1336, 1350 (N.D. Ill. 1979) *and* SEC v. Everest Mgmt. Corp., 87 F.R.D. 100, 105 (S.D.N.Y. 1980) (documents fall within rule 6(e)) *with* United States v. Stanford, 589 F.2d 285, 291 (7th Cir. 1978) *and* United States v. Weinstein, 511 F.2d 622, 627 n.5 (2d Cir. 1975) (documents may not fall within rule 6(e)). Courts tend to require a less stringent showing of need by document petitioners on the theory that documents do not reveal what transpired in the grand jury room. *See, e.g.*, Illinois v. Sarbaugh, 552 F.2d 768, 772 n.2 (7th Cir. 1977); *In re* Disclosure of Grand Jury Matters (Miller Brewing Co. II), 518 F. Supp. 163, 168 (E.D. Wis. 1981); United States v. Saks & Co., 426 F. Supp. 812, 814 (S.D.N.Y. 1976). One court has said that a showing of "particularized need" may not be required to obtain grand jury documents. *In re* Grand Jury Investigation (New Jersey), 630 F.2d 996 (3d Cir. 1980). The proper approach is one that considers the purpose for which documents are sought. If the documents are sought for their "intrinsic value," that is, for their own sake and not to find out what took place before the grand jury, they should be disclosable. *See* United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (2d Cir. 1960); *In re* Grand Jury Proceedings, 505 F. Supp. 978 (D. Me. 1981); United States v. Monsour, 498 F. Supp. 895 (W.D. Pa. 1980). *See also In re* Grand Jury Investigation of Ven-Fuel, 441 F. Supp. 1299 (M.D. Fla. 1977) (congressional subcommittee granted access to documents); Comment, *Civil Discovery of Documents Held by a Grand Jury*, 47 U. CHI. L. REV. 604 (1980) (proposing that document discovery requests be channelled through the original owner).

vestigations. Agency petitions for disclosure, however, raise difficult questions about the meaning of this exception. Although the rule plainly contemplates some disclosure of transcripts to assist civil law enforcement efforts, such disclosure gives rise to fears that the government may abuse the grand jury's great powers for civil discovery.

Federal agencies request access to grand jury transcripts because grand juries often investigate matters in which the agencies have an important law enforcement interest.[6] Where, not uncommonly, civil and criminal prosecutions involve the same alleged wrongdoing, the grand jury's record offers a valuable source of information to the agencies.[7] Consequently, agencies persistently seek transcripts of grand jury testimony to reduce the expense[8] and supplement the records[9] of their own investigation.

The agencies claim that their petitions for disclosure properly fall within the exception as requests made "preliminarily to or in connection with a judicial proceeding."[10] The courts have not agreed upon a consistent interpretation of this phrase, but most opinions relate its applicability to the *certainty* with which judicial review will follow agency use of the transcripts.[11]

This Note criticizes the certainty-based approach, and proposes a construction of rule 6(e) which would result in disclosure whenever an agency establishes that:

(1) Administrative enforcement action is subject to judicial review as a matter of law, without regard to the factual probability that such review will in fact occur;

(2) An affirmative absence of abuse characterizes the conduct of the grand jury investigation, *i.e.*, that legitimate criminal law enforcement purposes inspired the grand jury inquiry; and

(3) The agency has particularized need of the materials requested.

Part I examines the courts' current certainty-based perspective, and rejects this approach because it sacrifices important interests in civil

6. For example, both criminal and civil penalties are prescribed for the so-called "economic" crimes, such as price fixing, tax evasion and securities fraud. *See* Hassett, *Ex-parte Trial Discovery: The Real Vice of Parallel Investigations*, 36 WASH. & LEE L. REV. 1049, 1049-50 (1979); Pickholz & Pickholz, *Grand Jury Secrecy and the Administrative Agency: Balancing Effective Prosecution of White Collar Crime Against Traditional Safeguards*, 36 WASH. & LEE L. REV. 1027, 1031 (1979).

7. Because economic crimes are felonies, the fifth amendment requires indictment by grand jury prior to prosecution. *See* U.S. CONST. amend. V, cl. 1.

8. *See* Brief for Appellant at 17-18, United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980).

9. *See, e.g., In re* June 20, 1977 concurrent Grand Jury Investigation, J. Ray McDermott & Co., 622 F.2d 166, 168 (5th Cir. 1980) (Federal Energy Regulatory Commission) [hereinafter cited as *In re* J. Ray McDermott & Co.]; *In re* Disclosure of Grand Jury Matters (Miller Brewing Co. II), 518 F. Supp. 163, 168 (E.D. Wis. 1981) (Internal Revenue Service); *In re* Grand Jury Investigation, 414 F. Supp. 74, 76 (S.D.N.Y. 1976) (Securities and Exchange Commission).

10. *See* note 1 *supra*.

11. *See* notes 19-28 *infra* and accompanying text.

law enforcement and judicial consistency for speculative and coincidental reductions in grand jury abuse. Part II defends the proposed standard by arguing that it comports with the language and intent of the rule while more effectively advancing the policy interests in civil law enforcement and grand jury secrecy.

1. *The Failure of Certainty-Based Standards*

Whether an agency requests grand jury transcripts pursuant to a subsequent independent investigation[12] or in following its own involvement in the grand jury proceeding,[13] court-ordered disclosure depends on two determinations. Under rule 6(e)(3)(C)(i), the agency must petition for disclosure "preliminarily to or in connection with a judicial proceeding."[14] If the request falls within this exception, the agency must make a further showing of "particularized need," *i.e.*, that in the instant case, the benefits of disclosure exceed the costs to grand jury secrecy.[15] The court will order disclosure if it decides that

12. The agency is then contacted, either by the grand jury itself or by some other body, and is urged to begin its own investigation into alleged civil violations uncovered by the grand jury. *See, e.g., In re* J. Ray McDermott & Co., 622 F.2d 166, 167-68 (5th Cir. 1980) (referral to Federal Energy Regulatory Commission by New York State Public Service Commission); *In re* Disclosure of Testimony Before Grand Jury, 580 F.2d 281, 283-84 (8th Cir. 1978) (referral to Nebraska Commission on Judicial Qualifications *et al.* by grand jury).

13. This occurs when the United States Attorney directing an ongoing grand jury determines that agency expertise is required for the grand jury to intelligently consider the materials before it. *See, e.g.,* Coson v. United States, 533 F.2d 1119 (9th Cir. 1976); United States v. Evans, 526 F.2d 701 (5th Cir.), *cert. denied*, 429 U.S. 818 (1976); SEC v. Everest Mgmt. Corp., 87 F.R.D. 100 (S.D.N.Y. 1980); United States v. Gold, 470 F. Supp. 1336 (N.D. Ill. 1979); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa. 1976). The U.S. Attorney is allowed by Rule 6(e) to disclose grand jury materials to other government personnel for the purpose of assisting the criminal law enforcement process. FED. R. CRIM. P. 6(e)(3)(A)(ii); *see* INTERNAL REVENUE MANUAL — ADMINISTRATION (CCH) § 9267.1(3) (1981). Since the prosecutor and the grand jurors usually are not expert in such highly technical areas as tax and antitrust, agency personnel must assimilate and interpret documents and testimony. *See* 406 F. Supp. at 1105; *In re* William H. Pflaumer & Sons, Inc., 53 F.R.D. 464, 468 (E.D. Pa. 1971); Note, *Administrative Agency Access to Grand Jury Materials*, 75 COLUM. L. REV. 162, 172-73 (1975).

14. The exception under rule 6(e)(3)(A)(ii) pertains only to cases where the U.S. Attorney seeks expert technical assistance; rule 6(e)(3)(C)(ii) allows disclosure only to a defendant requesting that the indictment be dismissed. Thus, Rule 6(e)(3)(C)(i) is the only exception which the agencies can rely on in support of their disclosure requests.

Congressional committees occasionally seek grand jury materials for their own investigations, also relying on Rule 6(e)(3)(C)(i). The courts have not decided whether a congressional hearing is preliminary to a judicial proceeding. *Compare In re* Report and Recommendation of June 5, 1972 Grand Jury, 370 F. Supp. 1219 (D.D.C. 1974) (House Judiciary Comm. granted access) *with In re* Grand Jury Investigation of Uranium Industry, 1979-2 Trade Cas. (CCH) ¶ 62,798 (D.D.C. Aug. 21, 1979) (Senate Judiciary Comm. denied access). One writer has suggested that Rule 6(e) should be amended to expressly authorize disclosure to congressional committees when the committee can show specific need. Note, *Congressional Access to Grand Jury Transcripts*, 33 STAN. L. REV. 155 (1980).

15. "Particularized need" refers to an additional showing which the agency must make before disclosure will be allowed under rule 6(e). The test was read into the rule by the Supreme Court in United States v. Procter & Gamble Co., 356 U.S. 677 (1958). In order to satisfy the test, the petitioner must show that the need for disclosure outweighs the need for

the request meets the particularized need test.

A. *Current Approaches*

The courts have not adopted any consistent interpretation of rule 6(e)(3)(C)(i)'s exception for disclosure requests made "preliminarily to . . . a judicial proceeding."[16] The phrase provides no readily discernible standard, and the circuit courts have varied widely in their approaches to it.[17] Certain trends, however, have emerged. The majority of courts, presumably concerned with the potential for grand jury abuse if the government may easily satisfy the standards for disclosure,[18] require a reasonably high degree of certainty that a court

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secrecy in the case at hand. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979); L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 6:128 (1966). Although the test has developed generally in the context of private litigants, there is little doubt that it applies to public agencies. *See* Note, *Disclosure of Grand Jury Materials Under Clayton Act Section 4F(b)*, 79 MICH. L. REV. 1234, 1256 & n.82 (1981). The test is described in greater detail at notes 105-22 *infra* and accompanying text.

16. The courts are not alone in their confusion; a recent study found that government attorneys and law enforcement agents often do not know what grand jury materials are to be kept secret. GENERAL ACCOUNTING OFFICE, MORE GUIDANCE AND SUPERVISION NEEDED OVER FEDERAL GRAND JURY PROCEEDINGS 5 (GGD-81-18) (1980); *see* Winer, *Grand Jury Disclosures Scored*, NATL. L.J., Nov. 17, 1980, at 3, col. 1. Similarly, the Criminal Justice Subcommittee of the U.S. House of Representatives Judiciary Committee conducted a survey of disclosure policies followed by U.S. Attorneys' offices prior to the 1977 amendments to Rule 6(e). The subcommittee found that there was "no consistent practice" concerning what, when, and to whom information could be disclosed. H.R. REP. No. 195, 95th Cong., 1st Sess. 4-5 (1977).

17. *See* cases cited at notes 19-28 *infra*. This is not surprising, for the Supreme Court has provided little guidance in this area. The Court has decided only a few cases regarding petitions for disclosure under rule 6(e). Most of these cases deal with particularized need, *see, e.g.*, Dennis v. United States, 384 U.S. 855 (1966); Pittsburgh Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Procter & Gamble Co., 356 U.S. 677 (1958); *cf.* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 233-34 (1940) (disclosure will be allowed where the ends of justice so require). The only case arguably construing 6(e)(3)(C)(i)'s language is Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). *See* note 41 *infra*. The court has been reluctant to hear grand jury cases generally. *See* Granelli, *Defense Peers Into Grand Jury*, Natl. L.J., June 22, 1981, at 1, col. 1. The Court, however, will have the opportunity to clarify the confusion in this area when it decides *In re* The Special February 1975 Grand Jury, 652 F.2d 1302 (7th Cir. 1981), supplemented 662 F.2d 1232, *cert. granted,* United States v. Baggot, 50 U.S.L.W. 3994 (June 22, 1982) (No. 81-1938). The case presents the question of whether disclosure of grand jury material to the Internal Revenue Service for use in a civil tax evasion investigation satisfies the "preliminarily to a judicial proceeding" exception. *Baggot* involved a petition brought by the IRS seeking disclosure of the taxpayer's grand jury testimony. The transcripts were to be used to determine the taxpayer's civil tax liability. The Service argued that the "preliminarily to" language of the 6(e)(3)(C)(i) exception was satisfied because, under the procedures applicable at the time, any disagreement over the taxpayer's liability would be automatically reviewed by the tax court. The Seventh Circuit, in considerable tension with its own precedents, *see* note 30 *infra,* found the administrative proceeding "too embryonic, speculative and uncertain" to justify disclosure. 652 F.2d at 1309. Under the approach defended by this Note, the availability of judicial review as a matter of right satisfies the exception's threshold determination of applicability. Accordingly, the Court should reverse the Seventh Circuit and remand the case for an inquiry into particularized need and the absence of grand jury manipulation, with the Service bearing the burden of proof.

18. This concern has not been clearly articulated, but it forms a common thread linking the opinions. *See, e.g.*, Sells, Inc. v. United States, 642 F.2d 1184, 1190 (9th Cir. 1981), *cert.*

will ultimately review the agency's action.

The cases fall into two major categories, distinguished by the analytical approach to assessing the certainty of a subsequent "judicial proceeding." One approach looks to the statutory basis for the agency's action to determine the likelihood of judicial review.[19] If the legislation authorizing the agency proceedings suggests probable judicial review in typical cases, the court will deem the 6(e)(3)(C)(i) standard satisfied. Where, for example, the statute governing the agency action provides both for appeal by right to the courts and judicial review of all legal and factual questions,[20] the statute has been characterized as "plainly contemplat[ing]" a judicial proceeding.[21] Similarly, courts have ordered the release of transcripts to bar committees investigating alleged ethical improprieties of judges and lawyers, because such investigations are "designed to culminate" in judicial proceedings.[22] These courts, evidently, will infer the exist-

granted, 50 U.S.L.W. 3875 (May 4, 1982) (No. 81-1032); Patrick v. United States, 524 F.2d 1109, 1117 n.12 (7th Cir. 1975); *In re* April 1977 Grand Jury Proceedings, 506 F. Supp. 1174, 1182 (E.D. Mich. 1981); United States v. Young, 494 F. Supp. 57, 60-61 (E.D. Tex. 1980); *In re* Proceedings Before the Federal Grand Jury for the Dist. of Nev., 487 F. Supp. 1098, 1102-03 (D. Nev. 1980); *In re* Grand Jury Investigation, 414 F. Supp. 74, 76 (S.D.N.Y. 1976); *cf. In re* Grand Jury Subpoenas, April 1978, at Baltimore, 581 F.2d 1103, 1110 (4th Cir. 1978), *cert. denied,* 440 U.S. 971 (1979) (Rule 6(e) affords protection from grand jury abuse); J.R. Simplot Co. v. United States Dist. Court for the Dist. of Idaho *(In re* Grand Jury) 40 A.F.T.R.2d (P-H) ¶ 5001 (9th Cir. 1977), *withdrawn by unreported order,* June 28, 1977 (grand jury process can be manipulated by agency).

19. Thus, if, as a matter of law, a judicial proceeding cannot follow an administrative action, the exception is not satisfied. *See In re* Proceedings Before the Federal Grand Jury for the Dist. of Nev., 487 F. Supp. 1098, 1102 (D. Nev. 1980). Administrative actions subject to judicial review, however, have been held to fall within the exception. *See, e.g., In re* Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 897 (7th Cir. 1973) (disclosure allowed to Chicago Police Department's board of inquiry); Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958) (disclosure allowed to New York City Bar Association Grievance Committee); *accord, In re* Disclosure of Grand Jury Transcripts, 309 F. Supp. 1050, 1052 (S.D. Ohio 1970) (police disciplinary proceedings "clearly contemplate" judicial review and thus satisfy the exception).

20. *E.g., In re* Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 896 (7th Cir. 1973).

21. *In re* Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894, 897 (7th Cir. 1973). Note, however, that appeal under the Illinois scheme was not automatic. The Board of Inquiry must first have charged the officer with acts meriting dismissal or suspension for more than 30 days, *and* the officer must have decided to initiate the appeal to the courts. *See* 490 F.2d at 896.

22. *In re* Disclosure of Testimony Before Grand Jury, 580 F.2d 281, 286 (8th Cir. 1978); *see* United States v. Sobotka, 623 F.2d 764, 765-66 (2d Cir. 1980); Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958).

The courts have pointed to the attorney's special position as an officer of the court, *see, e.g.,* Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958); *accord,* United States v. Bates, 627 F.2d 349, 351 (D.C. Cir. 1980); United States v. Sobotka, 623 F.2d 764, 766 (2d Cir. 1980); *In re* J. Ray McDermott & Co., 622 F.2d 166, 170 (5th Cir. 1980). The cases do not, however, make clear what the standard is for determining when non-court hearings will be considered quasi-judicial for 6(e)(3)(C)(i) purposes. *See, e.g., In re* Disclosure of Testimony Before the Grand Jury, 580 F.2d 281, 286 (8th Cir. 1978). Certainly the notion that bar disciplinary committee investigations are any more judicial proceedings than are agency investigations appears to be little more than a convenient legal fiction. *But cf.* United States v. Bates, 627 F.2d 349, 351

ence of a subsequent "proceeding" from a statutory provision granting a broad right to appeal an adverse adminstrative decision, whether or not judicial review in fact occurs.[23] The cases suggest, however, that the statute must do more than afford the *right* to review; it must provide for a significant judicial role in the operation of the statutory scheme.[24]

The other approach assesses the likelihood of a subsequent "judicial proceeding" as a matter of fact.[25] Courts applying this approach have required a fairly high degree of certainty that judicial review will ultimately take place, although they have characterized the exact degree of certainty required in various terms.[26] These cases may require a showing that the requisite judicial proceeding is actively being sought.[27] A few recent cases go so far as to suggest that only absolute certainty of a subsequent judicial proceeding will satisfy the rule.[28]

Both approaches turn on the probability of ultimate judicial review, although they rely on different bases for estimating that probability. This focus on the certainty of subsequent judicial action significantly limits the number of 6(e) petitions that satisfy the exception, for both approaches require a fairly high probability of re-

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(D.C. Cir. 1980) (bar disciplinary proceedings are judicial proceedings because bar committees act as an arm of the courts).

23. *Cf. In re* Special February 1975 Grand Jury, 652 F.2d 1302, 1311 (7th Cir. 1981) (Pell, J., dissenting in part) (plain wording of 6(e)(3)(C)(i) authorizes disclosure even where subsequent judicial proceeding is not a practical certainty), *cert. granted*, United States v. Baggot, 50 U.S.L.W. 3994 (June 22, 1982) (No. 81-1938).

24. *See* notes 21 & 22 *supra*. To "plainly contemplate" or to be "designed to culminate" in judicial proceedings involves more than the possibility of a court challenge to agency action. Such language suggests that the underlying statute must evince an expectation of judicial review in typical cases.

25. *See In re* April 1977 Grand Jury Proceedings, 506 F. Supp. 1174, 1180 (E.D. Mich. 1981), and cases cited therein.

26. The projected sequence from administrative to judicial proceedings must, for example, be a "clear pathway," *In re* Grand Jury Matter, 495 F. Supp. 127, 130 (E.D. Pa. 1980); the judicial review proceeding must "flow naturally" from the administrative action, *In re* Grand Jury Investigation of Uranium Industry, 1979-2 Trade Cas. (CCH) ¶ 62,798 (D.D.C. Aug. 16, 1979), or the court must "reasonably anticipate" the subsequent proceeding, Patrick v. United States, 524 F.2d 1109, 1117 (7th Cir. 1975) (dictum). Conversely, some courts have said that subsequent judicial review must be, at the least, "more than a remote potentiality." United States v. Young, 494 F. Supp. 57, 60 (E.D. Tex. 1980); *accord*, *In re* J. Ray McDermott & Co., 622 F.2d 166, 171 (5th Cir. 1980).

27. *See In re* J. Ray McDermott & Co., 622 F.2d 166, 171 (5th Cir. 1980); *In re* April 1977 Grand Jury Proceedings, 506 F. Supp. 1174, 1181 (E.D. Mich. 1981) (by implication); United States v. Young, 494 F. Supp. 57, 59 (E.D. Tex. 1980).

28. *See, e.g.*, *In re* Grand Jury Proceedings (Wright II), 654 F.2d 268, 271-73 (3d Cir. 1981); *In re* Disclosure of Evidence Taken Before Special Term Grand Jury Convened on May 8, 1978, 650 F.2d 599, 601 (5th Cir. 1981); United States v. Young, 494 F. Supp. 57, 59 (E.D. Tex. 1980); *cf. In re* December 1974 Term Grand Jury Investigation, 449 F. Supp. 743, 751 (D. Md. 1978) (materials sought must be related to a "specific existing or contemplated judicial proceeding").

view.[29] The courts generally[30] have struck the balance between civil law enforcement and grand jury secrecy largely in favor of the latter interest.[31]

B. *A Critique of the Current Approach*

Whether the courts base their estimate of the likelihood of a subsequent judicial proceeding on the statutory scheme authorizing the administrative action or on extrinsic factual evidence of the likelihood of ultimate judicial review, this Note rejects the current certainty-based approach.[32] Three considerations contribute to this critique. First, neither the language nor the legislative history of the rule requires estimating the likelihood of judicial review as a precondition of disclosure. Second, the various certainty-based standards bear no rational relation to the prevention of grand jury abuse. Third, the certainty-based approaches seriously neglect the important policy interest of effective civil law enforcement.

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29. Whether judicial review must be "plainly contemplated" on the face of the authorizing statute, or must "flow naturally" from the agency's action, the courts require what amounts to a strong showing of its probability. *See* cases cited in notes 22 & 25-28 *supra*. *In re* Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973), allowed the most lenient standard of disclosure. In that case the court read rule 6(e)(3)(C)(i) to be satisfied whenever the administrative action was subject to full judicial review.

30. This grouping of the cases may impose a fictitious coherence on the existing decisions. The circuit courts' use of conclusionary terms to describe the appropriate scope of the exception has left the trial courts without a principled basis for applying the rule. Left to their own devices, the district courts have, not surprisingly, applied the exception inconsistently. *Compare In re* Special February, 1975 Grand Jury, 652 F.2d 1302, 1305 (7th Cir. 1981), *cert. granted,* United States v. Baggot, 50 U.S.L.W. 3994 (June 22, 1982) (No. 81-1938) (description of district court's order) *and In re* December 1974 Term Grand Jury Investigation, 449 F. Supp. 743 (D. Md. 1978) *with In re* Disclosure of Grand Jury Matters (Miller Brewing Co. II), 518 F. Supp. 163 (E.D. Wis. 1981) *and In re* April 1977 Grand Jury Proceedings, 506 F. Supp. 1174 (E.D. Mich. 1981) *and* United States v. Young, 494 F. Supp. 57 (E.D. Tex. 1980). Such inconsistencies can appear even in the opinions of the same appellate court. *Compare In re* Special Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973) (statute providing for officer's right to appeal adverse action of police review board "plainly contemplates" judicial review) *and* Patrick v. United States, 524 F.2d 1109, 1117 (7th Cir. 1975) (no abuse of trial court discretion in releasing testimony to Internal Revenue Service where judge could "reasonably anticipate" judicial review) *with In re* Special February, 1975 Grand Jury, 652 F.2d 1302, 1308 (7th Cir. 1981), *cert. granted,* United States v. Baggot, 50 U.S.L.W. 3994 (June 22, 1982) (No. 81-1938) (automatic appeal to Tax Court does not satisfy exception because IRS investigation "too embryonic, speculative and uncertain").

31. If rule 6(e)(C)(i) is not satisfied, the agency's particularized need arguments will not be considered by the court. *See, e.g.*, United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980) (Federal Maritime Commission); *In re* J. Ray McDermott & Co., 622 F.2d 166 (5th Cir. 1980) (Federal Energy Regulatory Commission); *In re* April 1977 Grand Jury Proceedings, 506 F. Supp. 1174 (E.D. Mich. 1981) (Internal Revenue Service); United States v. Young, 494 F. Supp. 57 (E.D. Tex 1980) (Texas State Medical Examiners). In these types of cases, therefore, disclosure will mechanically be denied no matter how compelling the agency's need.

32. Most of the cases adopt a standard requiring more than a reasonably high degree of certainty; since there is no uniform standard, however, this Note will use that term to refer to all of the cases using certainty-based standards.

1. *The Rule Itself Does Not Require Certainty*

If Congress had manifested the intention to strike a new balance between the competing interests of civil law enforcement and grand jury secrecy, that intention would control judicial interpretation of rule 6(e). A careful examination of the rule's language and legislative history, however, reveals no such intention. Consequently, the courts are free to shape their own approach, guided by the broader policy purposes Congress did express in the language and history of the rule.

The rule's wording, permitting disclosure "preliminarily to" a judicial proceding, involves an inherent paradox.[33] Whenever a court orders disclosure, the possibility exists that no judicial proceeding will follow the administrative action. The agency may decide not to act, or the parties subjected to an adverse administrative action may decide not to appeal. The agency and the suspected wrongdoers may agree to a settlement. These developments, *in retrospect*, reveal that the court did not order disclosure preliminarily to a judicial proceeding, contravening the rule. Similarly, whenever the court declines to order disclosure because a subsequent judicial proceeding appears insufficiently certain to satisfy the exception, the ultimate occurrence of judicial review may reveal, *in retrospect*, that the agency did seek disclosure "preliminarily" to a judicial proceeding. Thus, unless a subsequent judicial proceeding is either precluded or required as a matter of law, the application of the rule which will prove ultimately correct is unknowable, and the courts will inevitably, if unintentionally, violate its terms.

As a matter of probability, the standard resulting in the fewest such retrospectively revealed violations would deem the exception satisfied whenever a subsequent judicial proceeding appears more likely than not, rather than requiring any greater degree of certainty.[34] A more reasonable response to this analysis, however, would simply reject a literal interpretation of the exception. A certain absurdity inheres in any interpretation of a procedural rule by which the correctness of its application depends on arbitrary circumstances or the discretion of the parties. In any event, the mere language of the rule in no way suggests requiring a high probability of a subsequent judicial proceeding in preference to any other standard.

The distinction between "in connection" and "preliminarily to" casts further doubt on certainty-based standards. If a judicial proceeding precedes or will certainly follow the disclosure request, the petition is "in connection" with the proceeding, and the "prelimina-

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33. *See* note 1 *supra*.

34. This is because the decision not to disclose when the agency's petition falls within the exception violates the rule just as disclosure does when the exception is not ultimately satisfied.

rily" phrase adds nothing to the exception.[35] The rule's legislative history[36] reveals that the "preliminarily to" clause appears in the rule three drafts after the judicial proceedings clause. This reinforces the suggestion that Congress intended the "preliminarily to" exception to encompass disclosure in situations not involving an extant or certain subsequent proceeding.[37]

The congressional revision of rule 6(e) in 1977 did nothing to undercut this conclusion, and seems largely to have neglected the exception.[38] The legislative record reflects a concern, not with the

35. *See In re* Special February, 1975 Grand Jury, 652 F.2d 1302, 1310 (7th Cir. 1981) (Pell, J., dissenting in part), *cert. granted,* United States v. Baggot, 50 U.S.L.W. 3994 (June 22, 1982) (No. 81-1938). Such an interpretation would render superfluous the remainder of rule 6(e)(3)(C)(i)'s exception, which allows disclosure "in connection with" a judicial proceeding. *See* note 1 *supra*. The common meaning of "connection" is that two things are joined or linked together. WEBSTER'S NEW COLLEGIATE DICTIONARY 240 (1974). Implicit in this notion is the existence of the two things. The phrase "in connection with" therefore implies that the judicial proceeding for which disclosure is petitioned is already in existence.

Since the 6(e)(3)(C)(i) clauses are joined by the disjunctive "or," the section implies that each addresses a different situation. Therefore the "preliminarily to" language must contemplate some degree of uncertainty, since only existing proceedings are certain.

36. *See* note 1 *supra*. The exception's legislative history similarly does not require an analytical approach based on certainty. The earliest drafts of rule 6(e) allowed disclosure "in the course of judicial proceedings." The first draft of the Federal Rules of Criminal Procedure was dated September 8, 1941. L. ORFIELD, *supra* note 15, § 6:1, at 339. This draft contained no secrecy provision resembling the eventual rule. The first mention of disclosure appeared in the fourth draft, dated May 18, 1942. It prohibited disclosure of any testimony "except when required or permitted in the course of judicial proceedings." The rule took on its present form in the seventh draft (referred to as the first preliminary draft), dated May, 1943. Rule 7(e) provided for disclosure when "so directed by the court preliminary to or in connection with another judicial proceeding. . . ." *Id.*, § 6:1, at 344. Only one person commented on this phrase to the Advisory Committee; he urged that the exception should not extend to civil actions. L. ORFIELD, *supra* note 15, § 6:2, at 348. *See also* Berge, *The Proposed Federal Rules of Criminal Procedure*, 42 MICH. L. REV. 353, 361 (1943).

Rule 6 of the eighth draft (second preliminary draft), dated February, 1944, adopted the exception in its present form: "a" was substituted for "another," and the grammatically correct "preliminarily" replaced "preliminary." Again, one person commented on this phrase, urging that federal administrative proceedings should be considered "judicial proceedings," but that state court proceedings should not be so considered. The phrase was adopted unaltered by the Supreme Court in 1946, and has never been amended. L. ORFIELD, *supra* note 15, § 6:3, at 350-52. *See generally* Orfield, *The Federal Grand Jury*, 22 F.R.D. 343, 357-60 (1959).

37. Since the "preliminarily to" clause was not added to the rule until three drafts after the "judicial proceedings" clause appeared it is reasonable to presume that the "preliminarily to" language was considered independently, and that it was intended to modify the exception's scope. Had the rule's drafters merely left unmodified either the phrase "in the course of judicial proceedings" or its final draft analogue "in connection with a judicial proceeding," there would be little doubt that the judicial proceeding referred to must be in existence. The most reasonable inference, therefore, is that "preliminarily to" was added to mean judicial proceedings not yet in existence. If the drafters had intended a certainty requirement, they could have imposed one. Instead, they substituted "a judicial proceeding" for "another judicial proceeding," perhaps apprehending that a certainty requirement could be inferred from the word "another." *See* note 36 *supra*.

38. The major revisions to rule 6(e) in 1977 did not alter the exception's wording. *See* 123 CONG. REC. 25, 194-95 (1977) (statement of Rep. Mann). The revision's legislative history further reveals that

> The Senate Judiciary Committee report accompanying the amending bill to the floor states that the Congress possessed *no intent to preclude the use of grand jury-developed*

certainty of subsequent judicial action, but with the policies underlying the rule — the prevention of grand jury abuse and the facilitation of civil law enforcement.[39] Thus, neither the rule itself nor its legislative history requires the courts' current approach. Nor do the Supreme Court's opinions concerning the rule add much support to certainty-based standards.[40] Thus, only the furtherance of the poli-

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evidence for civil law enforcement purposes. On the contrary, there is no reason why such use is improper, *assuming that the grand jury was utilized for the legitimate purpose of a criminal investigation*. Accordingly, the Committee believes and intends that the basis for a court's refusal to issue an order under paragraph (C) to enable the government to disclose grand jury information in a non-criminal proceeding should be *no more restrictive* than is the case today under prevailing court decisions.

S. REP. NO. 354, 95th Cong., 1st Sess. 4-5, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS 527, 527-29 (footnote omitted) (emphasis added). Three observations may be made about this passage. First, there is no language explicitly limiting such disclosure with respect to the certainty of a subsequent judicial proceeding. Second, the major qualification upon the civil use of grand jury material comes not from the nexus between disclosure and judicial proceeding but from a requirement that the grand jury's purpose be legitimate. Third, the "prevailing court decisions" referred to in the Committee's report do not employ a certainty standard, nor do they support an inference favoring that standard. The committee referred to United States v. Procter & Gamble Co., 356 U.S. 677 (1958), and Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098 (E.D. Pa 1976). S. REP. NO. 354, *supra*, at 8 n.13, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS at 532. Neither of these cases contains any reference to the certainty of subsequent judicial proceedings. The Committee cites to pages 683-84 of *Procter & Gamble;* this part of the opinion holds that the particularized need test is required prior to disclosure, and goes on to state that the grand jury's investigative powers may not be used for civil purposes. 356 U.S. at 683-84. The Committee made no specific page reference when it cited *Hawthorne*; that case dealt with procedural safeguards required when the U.S Attorney sought to employ expert outside assistance during an ongoing grand jury investigation — essentially a 6(e)(3)(A)(ii) problem, not a 6(e)(3)(C)(i) issue. *Hawthorne's* relevance to 6(e)(3)(C)(i) petitions may be its underlying concern that the grand jury's process not be misused by government agencies. *See* 406 F. Supp. at 1122-25.

Four other major cases which could arguably be called "prevailing" had been decided at the time the Senate report was written. *In re* Special February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973), and Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958), discussed at notes 22-25 *supra* and accompanying text, allowed disclosure when the administrative action was *subject to* judicial review. *In re* Biaggi, 478 F.2d 489 (2d Cir. 1973), was a case where disclosure was allowed despite there being *no* pending judicial proceeding; in fact, the Second Circuit seemed to create its own exception to rule 6(e). Finally, *In re* Grand Jury Proceedings, 309 F.2d 440 (3d Cir. 1962), denied disclosure to the Federal Trade Commission for use in an *ex parte* administrative hearing. The case law, therefore, is ambiguous and does not offer persuasive support for a certainty-based standard.

On all three counts, then, the legislative history fails to provide support for a certainty-based standard.

39. *See* notes 36-38 *supra*.

40. Some decisions have suggested that dicta in Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979), requires that the trial court see some hard evidence of the subsequent judicial proceeding's certainty before finding 6(e)(3)(C)(i) fulfilled. The Court declared that "[p]arties seeking grand jury transcripts under Rule 6(e) must show that the material they seek is needed to avoid a possible injustice in another judicial proceeding. . . ." 441 U.S. at 222; *see In re* Grand Jury Proceedings (Wright II), 654 F.2d 268, 271-72 (3d Cir. 1981); *In re* Petition for Disclosure of Evidence, 650 F.2d 599, 601 (5th Cir. 1981); United States v. Young, 494 F. Supp. 57, 59 (E.D. Tex. 1980).

These opinions place too much reliance on a casual comment by the Court. The use of the word "another" to modify proceeding was explicitly rejected by the drafters of the rule, *see* note 36 *supra*, and reading a certainty requirement into the rule by inserting the term would reduce the "preliminarily to" clause to redundancy with the "in connection with" clause. Moreover, preventing "*possible* injustice in another proceeding" need not require a high de-

cies behind the rule can justify judicial reliance on the certainty criterion.[41] A careful policy analysis, however, suggests that the current approach taken by the courts does little to preserve the integrity of the grand jury process while seriously neglecting important civil law enforcement interests.

2. *Certainty-Based Standards Bear No Rational Relation to the Prevention of Grand Jury Abuse*

The law is settled that the government may not initiate or conduct a grand jury investigation for purposes of civil discovery.[42] Although rooted in somewhat anachronistic assumptions about the distinctions between civil and criminal regulations,[43] this fundamental principle enjoys enduring vitality. Essentially, both the government and potential defendants have a greater stake in uncovering the truth of a criminal matter than of a civil matter; society will tolerate the exercise of certain powers[44] to separate the innocent from the

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gree of certainty of subsequent judicial proceedings. The mere possibility of proceedings and a showing of particularized need would suffice to establish the possibility of injustice without disclosure.

Even assuming that "another" is read into the rule, predictive certainty of future proceedings would not be required. The rule's actual wording, "preliminarily to a judicial proceeding," obviously involves another proceeding when disclosure is sought to further a nonjudicial, *i.e.*, agency, proceeding. Consequently, even a sweeping reading of the *Douglas* dictum does little to clarify what likelihood of "another" proceeding must be shown to trigger disclosure.

41. When the wording of a statute admits of various possible interpretations, the courts must seek the intention of the legislature in the statute's structure and underlying purposes. A recent study capsulized the process by observing that "those who would properly apply a statute must seek to fulfill the substance of its policy within the framework of its text." J. HURST, DEALING WITH STATUTES 46 (1982).

42. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); *In re* Grand Jury Subpoenas, April 1978, at Baltimore, 581 F.2d 1103, 1108 (4th Cir. 1978), *cert. denied*, 400 U.S. 971 (1979); *In re* Grand Jury Investigation, 414 F. Supp. 74, 76 (S.D.N.Y. 1976).

43. When the government attempts to punish a corporation, it will often have either civil or criminal penalties available for the same misconduct. In such a situation, typical of agency-sought disclosure cases, the illegal conduct and the form of punishment (since corporations cannot be imprisoned) are the same whichever type of prosecution the government elects. By contrast, the purely criminal focus of the grand jury arose when criminal punishment (frequently capital) and the offenses giving rise to it differed profoundly from their civil counterparts. *See, e.g.*, Boudin, *The Federal Grand Jury*, 61 GEO. L.J. 1, 1-2 (1972); Pickholz & Pickholz, *supra* note 6, at 1028-29.

44. Conducting open-ended investigations, issuing subpoenas which are difficult for witnesses to quash, compelling the production of evidence, and operating free from formal rules of evidence are examples of these powers. *See* United States v. Calandra, 414 U.S. 338, 343-45 (1974); Branzburg v. Hayes, 408 U.S. 665, 668 (1972); Boudin, *supra* note 43, at 12-15; Note, *supra* note 13, at 177; Note, *The Grand Jury: Powers, Procedures and Problems*, 9 COLUM. J.L. & SOC. PROBS. 681, 686-99 (1973). *See also* Nitschke, *Reflections on Some Evils of the Expanding Use of the Grand Jury Transcript*, 37 ANTITRUST L.J. 198, 203 (1968) (calling the grand jury the most powerful inquisitorial body in our free society). Furthermore, since the grand jury adjudicates no rights, witnesses are not entitled to counsel during the hearing, *see In re* Groban, 352 U.S. 330, 333 (1957); *In re* Grumbles, 453 F.2d 119, 122 (3d Cir. 1971), *cert denied*, 406 U.S. 932 (1972). *But cf.* Lurie, *How Justice Loads the Scales Against Big Corporations*, FORTUNE, Dec. 29, 1980, at 86 (favoring a rule allowing counsel in the grand jury room). Witnesses may not cross-examine other witnesses, *see* United States v. Levinson, 405 F.2d 971,

guilty that it will not tolerate to separate the liable from the nonliable.[45]

Because the grand jury enjoys greater investigative powers than do administrative agencies,[46] its record will include information inherently beyond the reach of their civil discovery. Even where the agencies could theoretically build an identical record by relying on their own investigative powers, however, disclosure under Rule 6(e) greatly reduces the administrative and financial costs of such duplication.[47] These investigative advantages explain why 6(e) disclosure advances civil law enforcement and tempts government officials to abuse the grand jury's powers for purposes of civil discovery.[48]

Presumably, a concern with this potential for abuse underlies the courts' requirement for considerable certainty of subsequent judicial proceedings.[49] Yet a high probability of judicial revision bears no rational relation to the likelihood of abuse.[50] Grand jury abuse takes

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980 (6th Cir. 1968), *cert. denied*, 395 U.S. 906 (1969), nor may the accused present any defense, *see* United States v. Salsedo, 607 F.2d 318, 319 (9th Cir. 1979); United States v. Scully, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955); *In re* Grand Jury Proceedings Involving Berkley & Co., 466 F. Supp. 863, 867 (D. Minn. 1979). *But see* Arenella, *Reforming the Federal Grand Jury and the State Preliminary Hearing to Prevent Conviction Without Adjudication*, 78 MICH. L. REV. 463, 569 (1980) (arguing that the target defendant should have an opportunity to present exculpatory evidence). In short, the grand jury is allowed to make "massive intrusions on freedom and privacy" because these powers are necessarily commensurate with its task. United States v. Doe, 341 F. Supp. 1350, 1352 (S.D.N.Y. 1972); Note, *supra* note 13, at 177.

45. This proposition is implicit within the constitutional status of the grand jury: the grand jury's *criminal* law enforcement role is expressly stated in the fifth amendment. U.S. CONST. amend. V, cl. 1. The Constitution does not evince a similar concern for civil law enforcement. Civil sanctions, moreover, further reflect this proposition: they usually take the form of fines, a less serious sanction than imprisonment.

46. This result presumably occurs because of the grand jury's greater investigative power as compared to the agencies. *See* L. ORFIELD, *supra* note 15, § 6:107, at 473; Note, *supra* note 13, at 176.

47. This cost saving is quite often an important motive behind an agency's disclosure request. *See, e.g.*, Brief for Appellants at 37, United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980); *In re* J. Ray McDermott & Co., 622 F.2d 166, 169 (5th Cir. 1980); *In re* Disclosure of Grand Jury Matters (Miller Brewing Co. II), 518 F. Supp. 163, 168 (E.D. Wis. 1981).

48. Manipulation is made possible by the prosecutor's relative unfamiliarity with the economic crime statutes' most technical details. This unfamiliarity arguably leads the prosecutor to rely on assisting agency experts for advice about what witnesses and evidence to subpoena. *See In re* Special February, 1975 Grand Jury, 652 F.2d 1302, 1307 (7th Cir. 1981), *cert. granted,* United States v. Baggot, 50 U.S.L.W. 3994 (June 22, 1982) (No. 81-1938); J.R. Simplot Co. v. United States Dist. for the Dist. of Idaho, 40 A.F.T.R.2d (P-H) ¶ 5001 (9th Cir. 1977), *withdrawn by unreported order*, June 28, 1977; Note, *supra* note 13, at 180-81. This argument assumes that the prosecutor, and not the grand jurors, dictates the investigation's course. A number of commentators subscribe to this view. *See* L. CLARK, THE GRAND JURY 45-56 (1975); Abourezk, *The Inquisition Revisited*, BARRISTER, Winter 1980, at 19; Antell, *The Modern Grand Jury: Beknighted Supergovernment*, 51 A.B.A. J. 153 (1965). Moreover, the argument that the prosecutor exercises too much control over the grand jury is not new. *See* Chaplin, *Reform in Criminal Procedure,* 7 HARV. L. REV. 189, 190-91 (1893).

49. *See* note 25 *supra*.

50. A certainty standard does not alter the nature of the decision confronting an agency expert who is tempted to steer the prosecutor toward civil law areas. The expert, under a

place *before* the grand jury has completed its work; the reasonable certainty standard looks only to the use of grand jury materials *after* the grand jury has returned its indictment or no bill. If abuse has occurred, the standard does nothing to rectify it. Nor does the certainty of subsequent judicial action add to the chances of exposing abuse, for the judicial hearing on the rule 6(e) petition itself ensures judicial oversight of grand jury propriety in all cases where disclosure is sought.

Admittedly, minimizing the probability that the grand jury record will prove of ultimate use to the agency diminishes the expected rewards of abuse. An outright ban on the administrative use of grand jury minutes, or the absolutely arbitrary denial of disclosure in a high percentage of cases, would work the same result.[51] But Congress has expressed the intention to allow disclosure for civil law enforcement purposes in certain cases.[52] The courts must fashion an interpretation of rule 6(e) to minimize abuse within this parameter, but they may not substitute their judgment for the legislature's concerning the wisdom of disclosure *per se*. To the extent that the certainty standard discourages abuse by automatically denying disclosure without regard to the likelihood of abuse in particular cases, it amounts to just such a judicial excess.

Moreover, good reasons exist to doubt that an across-the-board reduction in the likelihood of the civil availability of transcripts will have much impact on the prevalence of abuse. Since the certainty standard neither eliminates nor varies the odds of disclosure, agency officials have no incentive not to influence the grand jury for purposes of their own investigation.[53] Even where formal disclosure is

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certainty standard, knows that the likelihood of a subsequent judicial proceeding is not at all affected by a decision to manipulate. Therefore the cost of manipulation is essentially unchanged by certainty-based standards.

51. To take an extreme example, simply requiring an agency to win a coin flip before filing a disclosure petition would reduce the expected rewards of manipulation by fifty percent, for such a procedure would reduce the probability of gaining access to the grand jury transcripts by half. Few, however, would defend this policy as a rational method of deterring grand jury abuse.

52. The Senate Report's explicit approval of disclosure practices no more restrictive than those currently applied manifests this intention. *See In re* Grand Jury Subpoenas, April 1978, at Baltimore, 581 F.2d 1103, 1110 (4th Cir. 1978) (Rule 6(e) approves "judicially supervised discovery of grand jury materials to government agency personnel for civil law enforcement purposes"); Hassett, *supra* note 6, at 1054; notes 36-38 *supra*.

53. *In re* J. Ray McDermott & Co., 622 F.2d 166 (5th Cir. 1980), illustrates the point. In *McDermott*, the Federal Energy Regulatory Commission (FERC) sought access to federal grand jury transcripts in order to investigate alleged price overcharges by natural gas pipeline manufacturers. Although the FERC possessed statutory authority to bring an injunctive action in federal district court, it elected instead to first file a 6(e) disclosure petition as a means of avoiding investigation costs. The Fifth Circuit held that the mere existence of the FERC's authority to seek an injunction did not satisfy the "preliminarily to" language, and denied the petition. The court added, however, that "[a]n injunction action in federal district court would undoubtedly satisfy the 'judicial proceeding' requirement of rule 6(e)." 622 F.2d at 171. Apparently, the Commission needed only to seek the injunction in order to fall within rule

completely precluded, unscrupulous agency officials have much to gain from diverting the grand jury to civil purposes.[54] Honest but overzealous officials who abuse the grand jury process because they convince themselves, erroneously, that this abuse serves a legitimate criminal investigative purpose probably arrive at this delusion without precisely calculating the advantages it offers. And scrupulous officials will not abuse the grand jury's powers no matter what the standard for disclosure.

Analysis of the risks of grand jury abuse thus reveals only a tenuous case for certainty-based standards. A more rational approach to grand jury abuse would look directly at the evidence of possible abuse on a case-by-case basis, rather than assume that the likelihood of judicial review somehow relates to the risk of such abuse.

3. *Certainty-Based Standards Neglect the Important Interest in Civil Law Enforcement*

Reliance on a certainty-based standard exacts a heavy social cost in foregone or more expensive civil law enforcement efforts.[55] A reasonable certainty standard limits the number of petitions which will meet the "preliminarily to . . . a judicial proceeding" language, because only those petitions where the court concludes that the subsequent judicial proceeding is quite likely will satisfy the exception. In certain cases, therefore, the courts will summarily reject disclosure petitions premised on legitimate agency need, even where no suggestion of grand jury abuse exists. This imposes an obvious cost to civil law enforcement.[56]

6(e)(3)(C)(i)'s exception. If this is the case, then the rule's applicability turns not on any inquiry into possible grand jury abuse, but only on an administrative choice between legal strategies. It is difficult to imagine how this could act to discourage FERC personnel from manipulating any future grand jury investigation.

54. Such officials can make *sub silentio* use of grand jury discoveries, which can be useful to the agency either as informal investigative tips or as formal evidence conveniently discovered by subsequent "independent" efforts. *See, e.g.,* Note, *Administrative Agency Access To Grand Jury Material Under Amended Rule 6(e),* 29 CASE W. RES. L. REV. 295, 327-29 (1978). The best deterrent to this sort of misconduct is a direct inquiry into the purposes of the grand jury investigation, with the agency bearing the burden of proof. Such a specific deterrent would impose a cost on grand jury manipulation itself, rather than crudely reducing the benefits to manipulation by indiscriminately limiting disclosure.

55. *See* notes 32-35 *supra* and accompanying text.

56. The cost of this sacrifice can take two forms. As one alternative, the agency could incur the out-of-pocket costs of conducting its own investigation. The investigation's opportunity cost is likely to be less funding for or complete foregoing of another civil investigation. Even if the agency successfully duplicates the grand jury's investigation, therefore, civil law enforcement proceedings in other areas will not take place. In the second case, the agency may be unable to duplicate the grand jury's investigation because records have been destroyed, *see* Bell & Schneider, *Critical Steps in Handling a Government Investigation,* 36 BUS. LAW. 643, 659 (1981), witnesses cannot be located, or the statute of limitations has nearly run out. *See* INTERNAL REVENUE MANUAL — ADMINISTRATION (CCH) § 9267.22(1)(c) (1981).

The cost, then, is more direct: agency civil law enforcement action is foregone, and whatever interest existing therein is forfeited. In some cases that loss can be substantial. *E.g.*

The courts should not underestimate those costs. Since disclosure would not benefit the agency unless the grand jury and agency investigations concern the same alleged wrongdoing, the social interest in preventing the harmful conduct is identical, whether the government proceeds against it civilly or criminally. Ensuring that the government will have only criminal sanctions at its disposal in a given case imposes serious costs on the government, the defendant, and the criminal law itself.[57] Congress has recognized the legitimacy of these concerns by explicitly approving disclosure to the agencies.[58] Absent a significant countervailing interest, the important advantages of disclosure to aid civil investigations mandate rejection of restrictive, certainty-based interpretations of Rule 6(e). This in turn suggests the need for an alternative interpretation.

II. An Alternative Standard: The Availability of Judicial Review

This Note proposes an interpretation of rule 6(e)(3)(C)(i) under which the court would order disclosure of grand jury transcripts whenever the administrative agency establishes:

(1) the *possibility*, as a matter of law, that its actions will be reviewed in a subsequent "judicial proceeding;"
(2) *the affirmative absence* of grand jury abuse; and
(3) *particularized need* for the transcripts requested.

The courts can then reconcile the competing interests, while employing familiar limiting devices to minimize the costs of disclosure.[59]

In re April 1977 Grand Jury Proceedings, 506 F. Supp. 1174, 1176 (E.D. Mich. 1981) (potential dispute involving approximately $300 million in income tax liability).

57. For the government, the likelihood of a more intensely defended prosecution increases the litigation costs of enforcement, while the expense of imprisonment adds to the cost of success. For typical economic offenders, a felony conviction and resulting prison sentence can be devastating. *See, e.g.,* Pelaez, *Of Crime — And Punishment: Sentencing the White-Collar Criminal,* 18 Duq. L. Rev. 823 (1980). The importation into the criminal law of the consequence-oriented standards of economic regulation, moreover, tends to erode that institution's sensitivity to the moral guilt of the individual as the touchstone of criminal liability. *See generally* F. Allen, Regulation by Indictment (1979). Indeed, the evolution of administrative law reflects the felt need for noncriminal approaches to economic misconduct. Ultimately, it may make little sense to "limit" governmental power to the exercise of the most coercive and expensive sanction it commands.

58. *See* notes 36 & 38 *supra*.

59. In making this proposal, the Note builds upon the rationales of *In re* February 1971 Grand Jury v. Conlisk, 490 F.2d 894 (7th Cir. 1973), and Doe v. Rosenberry, 255 F.2d 118 (2d Cir. 1958). *Conlisk* allowed disclosure where the statute involved provided for *de novo* judicial review as a matter of right. This Note proposes that disclosure be allowed wherever any judicial review may, as a matter of right, be obtained. Even when only review of legal issues is available, modern administrative procedures afford ample procedural protections in the fact finding process, and there is no threat that individual rights will be adjudicated without thorough testing of all grand jury-generated evidence used. *See* note 68 *infra* and accompanying text.

A. *The Advantages of the Proposed Standard*

The advantages of predicating disclosure on the possibility of judicial review largely parallel the defects in the certainty-based approaches. First, the proposed standard would eliminate a great deal of confusion. Trial judges would not need to make metaphysical judgments about whether or not a statute "contemplates" judicial review,[60] or speculate about the probability that administrative litigation will find its way into the courts.[61] The trial judge need only consider a single question of law, a question the court is best qualified to answer.[62]

Second, by facilitating disclosure whenever the agency establishes the absence of grand jury abuse, the alternative standard would further the civil law enforcement interests neglected by the certainty approach. Permitting the agency to demonstrate particularized need, rather than summarily dismissing disclosure petitions because of the insufficient likelihood that proceedings will follow, would effectively shift the focus away from the arbitrary probability of subsequent proceedings and instead require the courts to forthrightly compare the need for disclosure with the risk of abuse. The certainty-based standards can approximate such a balancing only by accident; the judicial review standard proposed here would place this comparison of the real interests involved at the core of the disclosure decision.

B. *Objections to the Judicial Review Standard*

Four principal objections may be raised against the approach advocated by this Note. First, easier agency access to grand jury material might imperil the right of individuals to judicial safeguards against unreliable grand jury evidence. Second, the increased opportunity for civil use of the grand jury's record might increase the incentives for government officials to pervert the grand jury process to advance civil investigations. Third, more liberal disclosure standards might confer excessive investigative power on administrative agencies. Finally, expanded disclosure may imperil the policy interests protected by grand jury secrecy. While plausible, these objections, even collectively, do not justify rejecting the significant advantages offered by the judicial review standard. Indeed, the proposed approach more effectively addresses valid apprehensions of excessive disclosure by making such concerns a central focus of the disclosure hearing's inquiry.

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60. *See* cases cited in notes 20-23 *supra*.

61. *See* notes 26-28 *supra* and accompanying text.

62. *See* S. REP. No. 354, *supra* note 38, at 8, *reprinted in* 1977 U.S. CODE CONG. & AD. NEWS at 532.

1. *The Right of Individuals to Judicial Scrutiny of Grand Jury Evidence*

Because the judicial review standard will lead to more frequent disclosure of grand jury transcripts, and because an actual judicial proceeding will often not follow such disclosures, the proposed standard may inspire fears that individuals may suffer adverse administrative decisions without judicial scrutiny of this less-than-reliable evidence. Similar fears may arise when the available judicial review is limited to matters of law.[63] In either case, evidence gathered without regard to its probity,[64] and unsubjected to judicial scrutiny, will influence the administrative proceeding. This result arguably contravenes both the language of the rule and the policy behind it.

Several arguments render this objection ultimately unpersuasive. The language of the rule offers no less support for the judicial review standard than for any other, given the inherent possibility that anticipated judicial proceedings will not materialize. Approaches requiring certainty, moreover, lead to a parallel offense to the rule's literal meaning whenever the courts deny disclosure but judicial review in fact occurs.[65] The most reasonable approach to the paradox contained in the rule's wording is to admit that "preliminarily" implies certain contingencies. Absent further congressional guidance, no reason exists to find legal possibility an inferior gauge of those contingencies than any other measure of certainty.

Second, the judicial review standard ensures, as a matter of law, the ultimate availability of judicial oversight of agency actions. In general, the object of the investigation, and not the agency, will control the decision of whether to exercise the right of appeal to the courts; the agency will not appeal its own decision. Thus whenever the agency acts adversely to an individual, that individual will have recourse to the courts under the judicial review standard. Where the agency takes no action, thus leaving nothing to appeal, it does not adjudicate the individual's rights unfavorably, and the unavailability of review inflicts only minimal injury.[66] Even under deferential standards, the certain availability of judicial review of unfavorable agancy actions provides an important initial safeguard of individual

63. *E.g., In re* J. Ray McDermott & Co., 622 F.2d 166, 170-71 (5th Cir. 1980).

64. *See In re* Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 31 n.11 (2d Cir. 1981); United States v. Scully, 225 F.2d 113, 116 (2d Cir.), *cert. denied*, 350 U.S. 897 (1955); Nitschke, *supra* note 44, at 305-06.

65. *See* note 33 *supra* and accompanying text.

66. It might be argued that disclosure implicates an individual's privacy rights without formal adjudication when the agency takes no appealable action, but the disclosure decision itself is subject to the rule 6(e) inquiry, which under the proposed approach would require agency proof of particularized need and the affirmative absence of manipulation.

adjudicative rights.[67]

Third, formal agency adjudicative hearings provide the same array of truth-testing devices available in a judicial proceeding.[68] The agency hearings division, rather than the investigative division, will conduct these proceedings.[69] Functionally, then, an agency hearing offers the same means to test the probity of evidence obtained from grand jury records as does a judicial proceeding, while the structural independence of those conducting the hearing suggests no improper motivation sufficient to induce a less-than-vigorous use of these fact-finding tools. The judicial review standard thus adequately serves the policy concerns motivating the rule's requirement of a "judicial proceeding."[70]

2. *The Risk of Grand Jury Abuse*

The proposed judicial review standard is significantly broader,

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67. Even under deferential standards of review, arbitrary or capricious agency action is grounds for reversal by the courts.

68. First, in some cases the agency may not impose any sanction without going to court. *E.g.*, *In re* J. Ray McDermott & Co., 622 F.2d 166, 171 (5th Cir. 1980) (quoting the Natural Gas Act, 15 U.S.C.A. § 717s (1980)). In these cases, the transcripts' probative value will be tested in a judicial proceeding; thus the problem will not arise.

Second, in cases where the disclosure petition is filed in anticipation of a formal agency adjudicative hearing before an administrative law judge, the very same panoply of truth-testing procedures are available as in a court trial. *See* G. ROBINSON, E. GELLHORN, & H. BRUFF, THE ADMINISTRATIVE PROCESS 28-29 (2d ed. 1980). Indeed, these hearings are nearly "carbon copies of judicial trials." Counsel represents each side; witnesses are cross-examined; objections may be raised; and the agency will be put to its proof. *Id.* at 29. Indeed, the "grossly excessive use of trial procedures" has been termed one of the "major illnesses" of the administrative process. 3 K. DAVIS, ADMINISTRATIVE LAW TREATISE §14:1, at 3 (1980).

69. *See, id.* at 28; 4 B. MEZINES, J. STEIN, & J. GRUFF, ADMINISTRATIVE LAW §§ 34.01, 34.03 (1981).

70. Respected authority holds that a "judicial proceeding" does not include administrative action for purposes of the rule. The prevailing definition of "judicial proceeding" appears in Judge Learned Hand's opinion in Doe v. Rosenberry, 255 F.2d 118, 120 (2d Cir. 1958): the term "judicial proceeding" includes any proceeding

> determinable by a court, having for its object the compliance of any person, subject to judicial control, with standards imposed upon his conduct in the public interest, even though such compliance is enforced without the procedure applicable to the punishment of crime.

Similarly, an "investigation undertaken . . . preliminary [sic] to or in connection with the ex parte administrative proceeding contemplated by the statute . . . is not preliminary to or in connection with a judicial proceeding within the intendment of the rule." *In re* Grand Jury Proceedings, 309 F.2d 440, 444 (3d Cir. 1962). The approval of existing case law in the legislative history of the revised rule, *see* note 37 *supra*, reinforces the vitality of these precedents.

But the rationale of these decisions does not support restrictions on agency access beyond those imposed by the judicial review standard for disclosure. These opinions appeared long before the contemporary statutory and judicial transformation of administrative procedure. *See* notes 64-68 *supra*. *Rosenberry*, moreover, was decided before the Supreme Court had read the particularized need test into the rule. *Rosenberry* was decided on May 8, 1958. 255 F.2d at 118. United States v. Procter & Gamble, 356 U.S. 677 (1958), was decided on June 2. Thus the contemporary safeguards on administrative procedure and grand jury disclosure, coupled with the ultimate availability of judicial review of administrative action, amply satisfy any concern for individuals' adjudicative rights.

initially,[71] than the certainty-based standards currently applied. Without more, this might increase the temptation to abuse the grand jury for civil purposes.[72] If the agency must show both particularized need[73] and the absence of grand jury abuse,[74] however, the number of petitions may not increase. Even if disclosure becomes more common, this will merely reflect the true number of meritorious petitions. Thus, the incentives for abuse will diminish even as civil law enforcement interests receive more favorable consideration.[75]

The courts apparently have sought to reduce the incentives for grand jury manipulation by making future access an unlikely event.[76] Requiring the petitioning agency to prove that the grand jury investigation did not in fact involve manipulation for noncriminal investigation would impose a more efficient deterrent. Existing case law[77] and Rule 6(e)'s legislative history[78] provide support for this requirement.

Several advantages have persuaded both courts[79] and commentators[80] to advocate this approach. First, the agency may be the only

71. The availability of judicial review establishes only that further specific inquiry should be made into grand jury abuse and particularized need. *See* notes 60-62 *supra* and accompanying text. The agency must carry its burden of proving the last two elements, as well, before disclosure may be obtained.

72. *See In re* Special February, 1975 Grand Jury, 652 F.2d 1302, 1307 (7th Cir. 1981), *cert. granted,* United States v. Baggot, 50 U.S.L.W. 3994 (June 22, 1982) (No. 81-1938); Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1124-25 (E.D. Pa. 1976); *In re* William H. Pflaumer & Sons, Inc., 53 F.R.D. 464, 476 (E.D. Pa. 1971); *cf.* Bradley v. Fairfax, 634 F.2d 1126, 1129 (8th Cir. 1980) (broad reading of "preliminarily to . . . a judicial proceeding" invites indiscriminate disclosure to a wide variety of agencies).

73. *See* text following note 111 *infra*.

74. *See* text following note 77 *infra*.

75. Certainty-based standards do not efficiently deter misuse. *See* text at notes 48-53 *supra*. In applying the standards, trial courts presently do not inquire uniformly into the possibility of grand jury misuse, *compare In re* Grand Jury Matter, 495 F. Supp. 127 (E.D. Pa. 1980) (no inquiry made into grand jury misuse) *and In re* Proceedings Before Federal Grand Jury for Dist. of Nev., 487 F. Supp. 1098 (D. Nev. 1980) (no inquiry into misuse) *with In re* Disclosure of Grand Jury Matters (Miller Brewing Co. II), 518 F. Supp. 163 (E.D. Wis. 1981) (finding the government had met its burden of proof by showing it had not misused grand jury) *and In re* April 1977 Grand Jury Proceedings, 506 F. Supp. 1174 (E.D. Mich. 1981) (finding the government had properly used grand jury in a good faith investigation of possible crimes), despite the issue's relevance to disclosure petitions.

76. *See* notes 48-53 *supra* and accompanying text.

77. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); United States v. Birdman, 602 F.2d 547, 563 (3d Cir. 1979); *In re* Grand Jury Subpoenas, April 1978, at Baltimore, 581 F.2d 1103, 1110 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); Patrick v. United States, 524 F.2d 1109, 1116 n.12 (7th Cir. 1975).

78. *See* notes 36-37 *supra*.

79. *See In re* Grand Jury Subpoenas, April 1978, at Baltimore, 581 F.2d 1103, 1110 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *In re* Disclosure of Grand Jury Matters (Miller Brewing Co. II), 518 F. Supp. 163, 166 (E.D. Wis. 1981); *In re* April 1977 Grand Jury Proceedings, 506 F. Supp. 1174, 1177 (E.D. Mich. 1981).

80. *See* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, MODERN CRIMINAL PROCEDURE 747 (5th ed. 1980).

party in court. Rule 6(e)'s legislative history suggests Congress' expectation that most disclosure hearings would be ex parte.[81] In such cases, the court is not exposed to the development of the issues through the adversary process.[82] Requiring the agency to overcome a presumption of misuse partially offsets this loss. Second, in typical cases, only the agency will possess the information necessary to carry the burden.[83] The agency will have worked with the United States Attorney on the investigation and will likely have records of the agents involved, the extent of disclosure to them, and the suggestions made regarding what course the grand jury should take.[84] In contrast, the party resisting disclosure, if any, will not have access to such evidence. Requiring this party to prove misuse would effectively frustrate the disclosure inquiry's purpose to prevent abuse.[85]

Third, the agency is subject to a powerful institutional incentive favoring grand jury manipulation.[86] Utilizing a pre-existing grand jury record offers a cost-effective alternative to financing a separate investigation.[87] The agency can learn that grand jury investigation materials are quite useful;[88] from there it is a short step to directing

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81. *See* S. REP. NO. 354, *supra* note 38, at 8, *reprinted in* U.S. CODE CONG. & AD. NEWS at 532. Although this practice is by not means universal, many disclosure petitions are heard ex parte. *See In re* April 1977 Grand Jury Proceedings, 506 F. Supp. 1174, 1176 (E.D. Mich. 1981); *In re* Grand Jury Matter, 495 F. Supp. 127, 129 (E.D. Pa. 1980); *In re* December 1974 Term Grand Jury Investigation, 449 F. Supp. 743, 744 (D. Md. 1978); United States v. Doe, 341 F. Supp. 1350, 1350 (S.D.N.Y. 1972).

82. *See In re* Grand Jury Matter, 495 F. Supp. 127, 134 (E.D. Pa. 1980).

83. *See Proposed Amendments to the Federal Rules of Criminal Procedure: Hearings on H.R. 5864 Before the Subcomm. on Criminal Justice of the House Comm. on the Judiciary*, 95th Cong., 1st Sess. 158 (testimony of Bernard J. Nussbaum) [hereinafter cited as *House Hearings*].

84. *See, e.g.*, INTERNAL REVENUE MANUAL — ADMINISTRATION (CCH) § 9267.3(1) (1981).

85. Requiring that the party resisting disclosure prove misuse would be a heavy burden. First, such a requirement implicates all of the problems associated with proving bad faith. *See* Y. KAMISAR, W. LAFAVE, & J. ISRAEL, *supra* note 80, at 745-46. Second, the out-of-pocket costs incurred will likely work a hardship on the resisting party. *See House Hearings*, *supra* note 83, at 157 (testimony of Bernard J. Nussbaum).

86. An agency seeking to pursue a civil charge against a party must make a decision about how to gather the necessary preliminary information. An organization will often choose the "first feasible solution" available to it. *See* R. CYERT & J. MARCH, A BEHAVIORAL THEORY OF THE FIRM 120-22 (1963); Coffee, *"No Soul to Damn, No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386, 396 (1981). Since the agency is already aware of the grand jury investigation, its decisionmaking process may well stop there. This proposition assumes that any organizational conflicts with respect to undertaking the civil investigation have been resolved. *See* R. CYERT & J. MARCH, *supra*, at 86.

It could be argued that since Cyert and March's work was done in the private firm context, their conclusions do not apply to government agencies. Cyert and March reject this contention, however; in fact, they found some evidence confirming their belief that their theory accurately predicted government agency behavior. *Id.* at 285-86, 288.

87. This provides much of the motivation for seeking grand jury transcripts. *See* notes 8-9 *supra*.

88. *See generally* R. CYERT & J. MARCH, *supra* note 86, at 123-25; Starbuck, *Organizational Growth and Development* in HANDBOOK OF ORGANIZATIONS 480 (J. March ed. 1965).

a grand jury investigation into civil enforcement areas.[89] Placing the burden of proof on the agency will tend to neutralize this institutional tendency toward abuse. Assuming that an absence of misuse cannot be shown in cases where misuse actually takes place, misuse of the grand jury process would foreclose the transcripts' later availability. Unlike the indiscriminate deterrence effected by certainty-based disclosure standards, the burden of proving grand jury propriety would specifically deter actual abuse without jeopardizing civil law enforcement interests.

Finally, placing the burden of going forward on the agency will minimize the costs of failing to carry the burden.[90] If the agency must show an absence of misuse and fails to do so, and the grand jury has been conducted for a legitimate purpose, the agency is denied disclosure.[91] While this result imposes serious costs on civil law enforcement efforts, more dangerous consequences follow from an erroneous presumption of grand jury legitimacy. Such a presumption rewards grand jury abuse in the absence of any evidence bearing on the question. This denies persons called to testify before the grand jury procedural protections,[92] grants the agency access to materials it should not have obtained,[93] and creates an incentive for future grand jury manipulation.[94] These consequences, and particularly the prospective nature of the last's effect, weigh in favor of placing the burden of proof on the agency.[95]

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89. This institutional incentive arises from the difference between an abuse's costs and benefits to the agency. The costs are negligible, since the courts are not uniformly looking into potential misuse when considering 6(e) petitions. Hence, there is little risk of jeopardizing the disclosure petition's success. *See* note 51 *supra*. In contrast, the potential benefit, in the form of the grand jury's detailed investigative record, can be quite great. The existence of this incentive has long been recognized. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 684 (1958) (Whittaker, J., concurring).

90. When an agency brings a disclosure petition, four possible outcomes are implicated. These are: first, the agency did not manipulate the grand jury, and disclosure is allowed. Second, the agency did not manipulate the grand jury, and disclosure is denied. Third, the agency did manipulate the grand jury, and disclosure is allowed. Fourth, the agency did manipulate the grand jury, and disclosure is denied. The first and fourth results are proper; the third result is error; and the second result is error if particularized need was shown.

91. The Note's hypothetical assumes that particularized need can be shown in each of the cases described in note 90 *supra*.

92. The procedural protections are those afforded witnesses before agency hearings which are not allowed in grand jury proceedings, primarily the right to counsel and cross-examination.

93. This results from the grand jury's superior information-gathering capability. *See* note 44 *supra*.

94. *See* notes 87-89 *supra* and accompanying text.

95. Abuse is not an exotic phenomenon. For example, government agents have purposely instituted grand jury investigations for civil investigative purposes. *See In re* April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1956); United States v. Doe, 341 F. Supp. 1350 (S.D.N.Y. 1972). In another case, "IRS employees not only breached grand jury secrecy, . . . but also . . . made a mockery of the protective role of the judiciary . . . ." Sam Cohen, 42 T.C.M (CCH) 312, 321 (1981).

Assuming that the agency is assigned the burden of proving absence of misuse, the court should consider a number of readily observable facts in determining whether the burden has been met. As an initial matter, a grand jury investigation should be considered *per se* misused if its stated purpose was to probe into civil matters.[96] Second, the grand jury's failure to issue an indictment should be considered evidence of bad faith,[97] given that the overwhelming proportion of grand juries return indictments rather than no bills.[98] This evidence could be rebutted by showing that good reason existed at the grand jury's outset to suspect that criminal wrongdoing had occurred.[99]

Moreover, the courts should closely scrutinize the working relationship between the grand jury and the agency for the existence of several factors involved in previous cases of grand jury misuse. Although *presence* of these factors does not necessarily support an inference of misuse, their *absence* in whole or in part may satisfy the agency's burden of showing no grand jury misuse.

The ultimate fact at issue is whether or not agency personnel directed the grand jury investigation into areas of purely civil interest. Factors which the courts have considered in answering this question include (1) identities of agency personnel involved in the criminal and civil investigations, their responsibilities, and the dates of their involvement with each investigation;[100] (2) the degree to which grand jury subpoenas tend to duplicate previously issued administrative subpoenas, if any;[101] and (3) whether the agency already possessed evidence sought by the grand jury.[102] Similarly, courts are more likely to find misuse if the grand jury investigation is begun at

96. *See* United States v. Doe, 341 F. Supp. 1350 (S.D.N.Y. 1972). *But cf. In re* April 1977 Grand Jury Proceedings, 506 F. Supp. 1174, 1177 (E.D. Mich. 1981) (suggesting that grand juries are often conducted with civil as well as criminal law objectives in mind).

97. *See In re* Grand Jury Subpoenas, April 1978, at Baltimore, 581 F.2d 1103, 1110 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *In re* Disclosure of Grand Jury Matters (Miller Brewing Co. II), 518 F. Supp. 163, 166 (E.D. Wis. 1981).

98. *See* FED. R. CRIM. P. 6(f); Y. KAMISAR, W. LAFAVE & J. ISRAEL, *supra* note 80, at 22; L. ORFIELD, CRIMINAL PROCEDURE UNDER THE FEDERAL RULES § 6:143 (1966). In fact, federal grand juries rarely return no true bills; in 1976, for example, grand juries returned approximately 23,000 indictments and 123 no true bills. *Grand Jury Reform: Hearings on H.R. 94 Before the Subcomm. on Immigration, Citizenship and International Law of the House Judiciary Comm.*, 95th Cong., 1st Sess. 738 (testimony of Benjamin R. Civiletti, Assistant Attorney General). *See generally* Morse, *A Survey of the Grand Jury System*, 10 OR. L. REV. 101 (1931) (the most detailed empirical study of grand juries).

99. *See* United States v. Procter & Gamble Co., 356 U.S. 677 (1958).

100. Sam Cohen, 42 T.C.M. (CCH) 312 (1981).

101. *In re* April 1956 Term Grand Jury, 239 F.2d 263, 267 (7th Cir. 1956).

102. *See In re* Gruberg, 453 F. Supp. 1225, 1232 (S.D.N.Y. 1978). ("that the IRS agent previously obtained these documents supports the inference that the grand jury desires them for its own independent investigation into possible criminal offenses rather than being used as a tool to assist the IRS in obtaining, for a civil investigation, material otherwise unavailable to it.").

the agency's request.[103]

None of these factors are conclusive, but taken as a whole they are probative of misuse. A showing that the grand jury returned an indictment and that agency personnel were involved only in evaluating evidence but not in subpoenaing or interrogating witnesses, for example, would satisfy the agency's burden of proving no misuse. If, on the other hand, the agency requested a grand jury shortly after an administrative investigation had stalled, the same agents were involved in both investigations, and the grand jury subpoenas substantially duplicated the administrative subpoenas, then the agency has offered no evidence to rebut a presumption of misuse.

In order to make such a showing in the future, the agencies may need to reconsider their personnel assignment procedures and keep detailed records of agents' activities. This will undoubtedly burden the agency with a cost; however, if the expected benefit is an increased ability to prove an absence of grand jury misuse — and hence a greater likelihood of transcript disclosure — agencies may be willing to accept it. At least one federal agency has significantly altered its procedures for dealing with grand juries along these lines.[104]

3. *Administrative Power*

Opponents of a judicial review standard also argue that the standard will result in agencies circumventing the restrictions Congress has placed on administrative investigations. The risk arises from the more sweeping investigative powers enjoyed by grand juries for criminal investigations than those the agencies may invoke for civil discovery.[105] This objection to the judicial review approach ignores both the congressional intent of Rule 6(e) and the protections afforded grand jury secrecy by the requirement of particularized need.

Rule 6(e) has the force of statute, and plainly contemplates some use of grand jury transcripts by administrative agencies.[106] Consequently, it makes little sense to object to an interpretation of the rule based on congressional constraints on agency investigative powers, for Congress has specifically expressed its intention to grant the

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103. *E.g., In re* Grand Jury Subpoenas, April 1978, at Baltimore, 581 F.2d 1103 (4th Cir. 1978), *cert. denied*, 440 U.S. 971 (1979); *In re* April 1956 Term Grand Jury, 239 F.2d 263 (7th Cir. 1956); *cf.* INTERNAL REVENUE MANUAL— ADMINISTRATION (CCH) § 9267.22 (1981) (procedures for Service-initiated requests for grand juries).

104. The Internal Revenue Service has since 1980 completely overhauled its regulations regarding Service cooperation with and requests for information developed by federal grand juries. *See* INTERNAL REVENUE MANUAL — ADMINISTRATION (CCH) § 9267 (1981).

105. *See, e.g.,* Note, *supra* note 13, at 177-82. The Note's analysis and language were adopted in Robert Hawthorne, Inc. v. Director of Internal Revenue, 406 F. Supp. 1098, 1124 (E.D. Pa. 1976).

106. *See* notes 44-46 *supra*.

agencies access to grand jury records.[107] Nor do the policy purposes of restricting agency investigative powers provide a rationale for limiting disclosure of grand jury transcripts beyond the limits imposed by the burden of disproving manipulation of the grand jury for purposes of civil discovery. Typically, the agency is familiar with the information contained in the transcripts before requesting its formal disclosure.[108] In these circumstances it would be perverse to frustrate civil law enforcement interests for restrictions on agency information-gathering powers which already have been sacrificed for the sake of administrative assistance in a criminal investigation. Finally, disclosure orders, based on the criteria of particularized need, can limit agency access to those portions of the grand jury record that critically relate to their legitimate law enforcement functions.[109] Such limited disclosure does more to advance the congressional purpose of civil law enforcement than it does to violate congressional restraints on administrative fact finding.[110]

4. *Grand Jury Secrecy*

The most widely apprehended fears of liberalized disclosure concern the erosion of grand jury secrecy, which would implicate important interests in preserving witness candor and avoiding unnecessary stigma.[111] Two major arguments render this objection unpersuasive. First, under the proposed approach, the courts would order disclosure only on a showing of particularized need, thus restricting disclosure to those cases of clear necessity. Second, disclosure to administrative agencies poses only incremental risks of ultimate disclosure beyond the agency itself.

The particularized need test ensures that secrecy will prevail absent a compelling need for disclosure. The Supreme Court has read

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107. *See* note 52 *supra*.

108. When agency personnel assist the grand jury in its investigation, it seems no more than a polite fiction to maintain that the agency itself has not gained access to information gathered through the exercise of the grand jury's powers.

109. *See* note 123 *infra* and accompanying text.

110. The difference between grand jury and administrative investigations, while real, may be overstated. *See* United States v. Morton Salt Co., 338 U.S. 632, 642 (1950) (administrative investigative power "is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not."); Note, *Reasonable Relation Reassessed: The Examination of Private Documents by Federal Regulatory Agencies,* 56 N.Y.U. L. REV. 742, 749-53, 782-807 (1981) (agency investigative power so expansive that new restrictions are required).

111. *See, e.g.,* Note, *supra* note 13. Secrecy enhances the investigative efficacy of the grand jury by encouraging witnesses to testify without fear of stigma or reprisal. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979); United States v. Scott Paper Co., 254 F. Supp. 759, 761 (W.D. Mich. 1966); Philadelphia v. Westinghouse Elec. Corp., 210 F. Supp. 486, 490 (E.D. Pa. 1962) (the "willingness of a witness to speak openly without fear must not be subordinated to any policy if the Grand Jury system is to function"). For a more general discussion of the purposes behind grand jury secrecy, see note 116 *infra*.

the test into Rule 6(e),[112] and its principles can be easily applied in administrative disclosure cases. Most importantly, it substantially protects the interests of individuals in grand jury secrecy.

The test for particularized need involves two elements. First, the party seeking disclosure must overcome the presumption of grand jury secrecy by demonstating a "compelling" need[113] that outweighs the importance of continued secrecy.[114] Second, the request must be narrowly structured "to cover only material so needed."[115] The test thus anticipates that the court consider the disclosure petition's breadth as well as its urgency. Both of these inquiries provide significant protection against excessive transcript disclosure to federal agencies.

The first component of the particularized need test balances the interests in secrecy against the petitioner's need.[116] Before allowing disclosure, the courts should require a clear demonstration by the

112. The seminal case is United States v. Procter & Gamble Co., 356 U.S. 677 (1958). In that case, the government brought a civil antitrust action against Procter & Gamble under § 4 of the Sherman Act. A federal grand jury had earlier refused to indict Procter & Gamble on criminal antitrust charges; the government thereupon used the transcripts in the civil case. Procter & Gamble sought access to the grand jury transcripts, but its request was denied because it could not show the requisite need. The particularized need test was recently affirmed by the Court. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211 (1979). *See generally* Maximov, *Access By State Attorneys General to Federal Grand Jury Antitrust Investigative Materials*, 69 CAL. L. REV. 821, 824-25 (1981)(discussing *Douglas Oil*); Casenote, *The Discovery and Production of Grand Jury Proceedings*, 19 MD. L. REV. 326 (1959) (discussing *Procter & Gamble*); Recent Decisions, *Civil Procedure — Disclosure of Minutes When Grand Jury Was Used for Purpose of Preparing for Civil Action*, 59 MICH. L. REV. 123 (1960) (critically commenting on *Procter & Gamble*). The reasoning advanced by the Court in *Procter & Gamble* was essentially the same as that used three years before by the trial court in United States v. Ben Grunstein & Sons Co., 137 F. Supp. 197 (D.N.J. 1955). For other discussions of particularized need, *see* Boudin, *supra* note 43, at 31-33; Calkins, *Grand Jury Secrecy*, 63 MICH. L. REV. 455, 457 (1965); Case Note, *Criminal Procedure — Inspection of Grand Jury Minutes Granted to a Public Agency for Purposes Not in the Furtherance of Criminal Justice*, 40 FORDHAM L. REV. 175, 176-78 (1971); Note, *supra* note 15, at 1251.

113. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 n.13 (1979).

114. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979); *accord*, *In re* Grand Jury Proceedings (Wright II), 654 F.2d 268, 271-72 (3d Cir. 1981); *In re* Disclosure of Evidence Taken Before Special Grand Jury Convened on May 8, 1978, 650 F.2d 599, 601 (5th Cir. 1981). *But see* Note, *The Use of Grand Jury Transcripts in Private Antitrust Litigation: An Argument for Automatic Access*, 58 TEXAS L. REV. 647 (1980).

115. Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979).

116. Five goals are considered in determining the secrecy presumption's weight. These are: (1) preventing the escape of those under investigation; (2) minimizing the likelihood of interference with the grand jurors; (3) preventing any tampering with witnesses; (4) encouraging free and uninhibited testimony by witnesses; and (5) protecting the innocent accused from stigmatization and the cost of a needless defense. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 219 n.10 (1979); United States v. Procter & Gamble Co., 356 U.S. 677, 681 n.6 (1958). Recognition of these five goals can be traced back through United States v. Rose, 215 F.2d 617, 628-29 (3d Cir. 1954) and United States v. Amazon Ind. Chem. Corp., 55 F.2d 254, 261 (D. Md. 1931), to nineteenth century state cases. *See* Recent Decisions, *Criminal Procedure — Secrecy of Grand Jury Proceedings — Accessibility of Grand Jury Minutes*, 37 COLUM. L. REV. 315, 317 (1937). Of these five goals, the fourth always retains weight since it is the most important factor in protecting the grand jury's ability to function. *See* Douglas Oil

agency that the information expected from the transcripts cannot be obtained from other sources. Cost savings and efficiency gains do not constitute sufficient need.[117] Thus, disclosure of grand jury material appears restricted to information which the agency cannot obtain through its ordinary investigative procedures, due to either the greater powers of the grand jury or external circumstances.[118]

The particularized need test's second element requires that petitions for disclosure do not extend beyond the claim of necessity which underlies them, so that the veil of secrecy is lifted "discretely and limitedly."[119] The necessity inquiry goes essentially to the gravity of the disclosure request; this second element goes to its scope.

Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979); Y. KAMISAR, W. LAFAVE, & J. ISRAEL, *supra* note 80, at 716-17.

In the context of agency disclosure petitions, the secrecy presumption remains quite heavy. First, the interest in encouraging testimony is unusually strong. Corporate entities are often the targets of grand jury and agency investigations into economic wrong-doing. *E.g.*, *In re* Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24 (2d Cir. 1981); United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980); *In re* J. Ray McDemott & Co., 622 F.2d 166 (5th Cir. 1980); *In re* April 1977 Grand Jury Proceedings, 506 F. Supp. 1174 (E.D. Mich. 1981). In order to succeed, grand juries must rely heavily on testimony of employees having inside knowledge of statutory violations. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958); Note, *supra* note 15, at 1262. These witnesses are especially jeopardized by disclosure, for the "corporate employer . . . has greater incentive and power to retaliate than anyone else." Illinois v. Sarbaugh, 552 F.2d 768, 775 (7th Cir. 1977); *see* Douglas Oil. Co. v. Petrol Stops Northwest, 441 U.S. 211, 222 (1979). Moreover, the witness' business relationships, and therefore his livelihood, could be disrupted by disclosure. Brief for Appellees at 17, United States v. Bates, 627 F.2d 349 (D.C. Cir. 1980).

Second, the reputational interest is similarly quite high. Economic crime investigations often extend over long periods of time and gather great amounts of material. *E.g.*, *In re* Grand Jury Investigation of Cuisinarts, Inc., 665 F.2d 24, 28-29 (2d Cir. 1981); *In re* April 1977 Grand Jury Proceedings, 506 F. Supp. 1174, 1176 (E.D.Mich. 1981). Consequently, large numbers of innocent individuals may be mentioned before the grand jury who are unaware of any investigation. These persons presumably have an interest in maintaining secrecy because they could conceivably be seriously harmed by disclosure of hearsay. *See* Illinois Petition v. Widmar, 1980-81 Trade Cas. ¶ 78,103, 78,108 (N.D. Ill. 1981); Note, *Civil Discovery of Documents Held by a Grand Jury*, 47 U. CHI. L. REV. 604, 619 (1980); Note, *Release of Grand Jury Minutes in the National Depostion Program of the Electrical Equipment Cases*, 112 U. PA. L. REV. 1133, 1141 (1964). Two courts of appeals have acknowledged that witnesses have an interest in preventing disclosure of their testimony. *See* Petrol Stops Northwest v. Continental Oil Co., 647 F.2d 1005, 1009 & n.3 (9th Cir. 1981); *In re* Disclosure of Testimony Before the Grand Jury, 580 F.2d 281, 284-85 (8th Cir. 1978).

117. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958). A case can be made for allowing disclosure, in the interests of convenience, of documents in the grand jury's possession which would be subject to administrative subpoena. Given that the agency will obtain these records anyway, the privacy interests of those who provided them to the grand jury would not seem to justify imposing a needless cost on the government. The relevant inquiry concerns whether the agency seeks the documents for their intrinsic evidentiary value, or as indicators of what took place in the grand jury room. *See* note 5 *supra*. By the same token, however, such a rule would not address the more difficult and more important question of when evidence unique to the grand jury's record should be made available to administrative agencies. Given the congressional intention to make such evidence available in at least some cases, *see* note 52 *supra*, this question cannot be avoided.

118. *See* United States v. Young, 494 F. Supp. 57, 63 (E.D. Tex. 1980); *In re* Grand Jury Investigation, 414 F. Supp. 74, 77 (S.D.N.Y. 1976).

119. United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958).

The cases have recognized the requirement, but have not fully developed its application. The opinions tend to focus on two extremes; a request for the entire transcript is usually considered too broad to be approved,[120] while requests made for purposes of impeaching witnesses or refreshing memories are found to be tailored with sufficient precision to satisfy the test.[121] The possibility that these latter functions help prevent possible injustices at trial reinforces the latter conclusion.[122]

This narrowness requirement offers a convenient solution to the concern that agencies receive too much when they gain access to grand jury transcripts.[123] The court can limit the agency's access to portions of the transcripts that bear upon its civil investigation by requiring the agencies to file detailed disclosure petitions which specify the agency's statutory authority to investigate, the limits to that authority, and what the agency expects the transcripts to reveal.[124] The court can also review the transcripts themselves, to ensure that only material relevant to the agency's investigation will be disclosed.[125]

Under this approach, the agency would receive only information which relates to its legitimate civil law enforcement function and which it could not itself obtain. Within these parameters, disclosure fulfills the purpose of Rule 6(e) by furthering civil law enforcement without additional intrusions into individual interests protected by grand jury secrecy.

The second consideration limiting the erosion of grand jury secrecy, beyond the requirement of particularized need, is the fact that granting an agency's disclosure petition adds little to the existing risks of retaliation against, or stigmatization of, grand jury witnesses. Grand jury witnesses always run the risk of testifying at trial.[126] Dis-

120. *See* United States v. Proctor & Gamble Co., 356 U.S. 677, 683 (1958); *In re* Disclosure of Testimony Before the Grand Jury, 580 F.2d 281, 287 (8th Cir. 1978); United States v. Young, 494 F. Supp. 57, 63-64 (E.D. Tex. 1980).

121. *See* United States v. Procter & Gamble Co., 356 U.S. 677, 683 (1958); *In re* Disclosure of Grand Jury Matters (Miller Brewing Co. II), 518 F. Supp. 163, 169 (E.D. Wis. 1981); *In re* Grand Jury Investigation, 414 F. Supp. 74, 77 (S.D.N.Y. 1976).

122. *See* Douglas Oil Co. v. Petrol Stops Northwest, 441 U.S. 211, 221 (1979) (quoting United States v. Procter & Gamble Co., 356 U.S. 677, 682 (1958)).

123. This concern is based on the assertion that access to grand jury transcripts allows administrative agencies to circumvent the statutory limits placed on their investigative powers. *See* H.R. REP. No. 195, *supra* note 16, at 4; Note, *supra* note 13, at 178-79.

124. Though this will doubtless impose a cost on the agencies, it is likely to be far less than the cost of developing the information in a separate investigation.

125. *See In re* Disclosure of Testimony Before the Grand Jury, 580 F.2d 281, 287 (8th Cir. 1978); Illinois v. Sarbaugh, 552 F.2d 768, 776 (7th Cir. 1977).

126. *See* 1 C. WRIGHT, FEDERAL PRACTICE AND PROCEDURE, FEDERAL RULES OF CRIMINAL PROCEDURE § 106, at 170-77 (1969); Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. MAR. J. PRAC. & PROC. 18, 21 (1967); Knudsen, *Pretrial Disclosure of Federal Grand Jury Testimony*, 48 WASH. L. REV. 423, 444-46 (1973); *Developments in the Law — Discovery*, 74

closure "in connection with or preliminarily to" a private civil action poses an additional risk.[127] A certain risk to grand jury secrecy thus inheres even in certainty-based approaches which minimize total disclosure to agencies. Indeed, requiring a subsequent judicial proceeding may encourage the agencies to make public evidentiary presentations they could otherwise avoid.[128]

By contrast, disclosure to agencies poses little ultimate risk of revealing grand jury testimony of the sort which would inhibit witnesses. In most cases, the agencies already know the substance of the disputed testimony.[129] Upon disclosure, this information is unlikely to go beyond the agency itself. Most agency proceedings never reach the adjudication stage.[130] Preadjudication discovery will rarely enable the defense to learn the details of grand jury testimony;[131] when it does, the presiding officer can issue a protective order to avoid compromising grand jury secrecy.[132] The incremental threat to grand jury secrecy thus seems too remote to justify indiscriminate denial of grand jury material to agencies that succeed in showing particularized need. Congress, in any event, appears to have accepted some compromise of grand jury secrecy in the interest of civil law enforcement.

HARV. L. REV. 940, 1013-14 (1961); Recent Decisions, *Civil Procedure — Disclosure of Minutes When Grand Jury Was Used for Purpose of Preparing for Civil Action,* 59 MICH. L. REV. 123, 125 (1960).

127. Private plaintiffs may appear in the wake of a government investigation of almost any economic crime, with the exception of tax offenses. Antitrust and securities are familiar examples. *See, e.g.,* Korman, *The Antitrust Plaintiff Following in the Government's Footsteps,* 16 VILL. L. REV. 57 (1972); Kurland, *Discovery: Its Uses and Abuse — The Plaintiff's Perspective,* 44 ANTITRUST L.J. 3 (1975).

128. If the agency must commence a civil proceeding to obtain the grand jury records it desires, the fruits of disclosure will necessarily become known through that proceeding. The risks of stigma and reprisal are little less in the administrative context than they are in that of the grand jury. *See* Bell & Schneider, *supra* note 56, at 656-67 ("You can literally win the administrative battle yet lose the war as a result of damaging publicity."); Coffee, *supra* note 86, at 425; Gellhorn, *Adverse Publicity by Administrative Agencies,* 86 HARV. L. REV. 1380 (1973).

129. *See* note 108 *supra*.

130. *See, e.g.,* Claggett, *Informal Action — Adjudication — Rule Making: Some Recent Developments in Federal Administrative Law,* 1971 DUKE L.J. 51, 55-56 ("Clearly, the vast bulk of administrative policy decisions are in fact made by informal action, with the more formal procedures occupying only a small part of the whole."); Gellhorn, *Rules of Evidence and Official Notice in Formal Administrative Hearings,* 1971 DUKE L.J. 1, 2 ("Most administrative enforcement has relied upon informal methods, including advisory letters, administrative warnings, or settlement stipulations."); Posner, *A Statistical Study of Antitrust Enforcement,* 13 J. L. & ECON. 365, 375 (1970) (few FTC complaints reach formal adjudication).

131. *See* Armstrong, Jones, & Co. v. Securities and Exch. Commn., 421 F.2d 359, 364 (6th Cir. 1970) (Commission need not furnish identity of witnesses to defense prior to agency adjudication); Dlugash v. Securities and Exch. Commn., 373 F.2d 107, 110 (2d Cir. 1967) (same); Tomlinson, *Discovery in Agency Adjudication,* 1971 DUKE L.J. 89, 100 n.49 ("Among agencies with adjudicatory responsibilities, only the FTC routinely discloses its witness list prior to the hearing.").

132. *See* Tomlinson, note 131 *supra,* at 102.

CONCLUSION

Federal Rule of Criminal Procedure 6(e) embodies competing policies. Its general rule of grand jury secrecy protects the public both from abuse of the grand jury's powers and from potential emasculation of the grand jury as a tool for combatting crime. The rule's exception which allows disclosure "preliminarily to or in connection with a judicial proceeding," however, contemplates allowing use of the grand jury's fruits for civil law enforcement purposes. Such use necessarily threatens the policies protected by secrecy, by creating an incentive to abuse the grand jury and by implicating the security interests of witnesses. These competing interests can best be reconciled by reading the exception's language to permit disclosure whenever, as a matter of law, subsequent judicial review of administrative agency action is possible. Applying this standard will allow for a full debate in each case over the strength of the competing interests, leading to more principled and uniform treatment of transcript disclosure petitions.